STATE OF MICHIGAN

COURT OF APPEALS

VICKY PERKINS, Plaintiff- Appellant/Cross-Appellee,	UNPUBLISHED October 21, 2003
v	No. 241609 Macomb Circuit Court
FORD MOTOR COMPANY, Defendant-Appellee/Cross-Appellant.	LC No. 2001-000150-CZ

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition under MCR 2.116(C)(4) and (10), on the ground that plaintiff's action was barred by the exclusive remedy provision of the Worker's Disability Compensation Act ("WDCA"), MCL 418.131(1). Defendant cross-appeals, arguing that the court erred in denying its motion for summary disposition on the alternative ground that plaintiff's action was barred by the three-year statute of limitations, MCL 600.5805(9). We affirm.

Plaintiff argues that she established a genuine issue of material fact with regard to whether defendant committed an intentional tort. We disagree.

The right to the recovery of benefits under the WDCA is the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240-241; 608 NW2d 487 (2000).

MCL 418.131(1) provides in pertinent part:

> *An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.* The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law. [Emphasis added].

"[T]o state a claim against an employer for an intentional tort, the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 172; 551 NW2d 132 (1996). Where there is no direct evidence of an intent to injure, an employer's intent to injure may be inferred from the surrounding circumstances. *Id*. at 172-173. "A plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Id*. at 173-174. To show that an injury was "certain to occur," a plaintiff must establish that "no doubt exists with regard to whether it will occur." *Id*. at 174. To show that a defendant "willfully disregarded" knowledge that an injury was certain to occur, "the employer's act or failure to act must be more than mere negligence, that is, a failure to act to protect a person who might foreseeably be injured from an appreciable risk of harm." *Id*. at 179.

Plaintiff's amended complaint alleged that Robert Clifton, plaintiff's supervisor from August 1997 to June 1998, and Dr. Arthelia Brewer, defendant's physician, possessed the requisite state of mind to establish an intentional tort. We disagree.

With regard to Clifton, the evidence failed to show that he intended an injury to plaintiff. Each time medical restrictions were placed on plaintiff, Clifton adhered to them by taking plaintiff off the job. In addition, the email correspondence regarding the OP 40 machine, which plaintiff alleges caused her injuries, does not provide support for plaintiff's intentional tort claim. As the circuit court noted, "the e-mail messages simply reflect an attempt by Clifton and others to improve the overall work environment for defendant's employees, not an intention to harm plaintiff." As plaintiff acknowledged, Clifton never compelled her to operate the OP 40 machine. Further, plaintiff admitted that the OP 40 functioned properly when she operated it, and that she was never required to operate a machine that was malfunctioning. Also, plaintiff admitted that she never asked Clifton to transfer her to another department, nor did she ever file a grievance with Clifton or the UAW complaining that the OP 40 presented an unusual health or safety risk. Plaintiff also failed to show that Clifton, by filing the MIOSHA-related injury reports, willfully disregarded actual knowledge that an injury to plaintiff was certain to occur. These reports were defendant's own internal accident reports, not admissions of MIOSHA violations. In any event, defendant's filing of the reports does not demonstrate that it willfully disregarded knowledge of plaintiff's injuries.

With regard to Dr. Brewer, the plant's physician, the evidence established that she had no authority to hire, fire or discipline plaintiff and, thus, was not a supervisory or managerial employee. See *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 154 n 5; 565 NW2d 868 (1997) (defining "supervisory or managerial employee" as an employee with the "authority to hire, fire, or discipline employees"). Therefore, Dr. Brewer's knowledge could not be imputed to defendant for the purpose of establishing an intentional tort claim against it. Further, the evidence did not show that Dr. Brewer had actual knowledge that an injury to plaintiff was certain to occur. Nor was there evidence that Dr. Brewer willfully disregarded any knowledge about plaintiff's condition. Dr. Brewer placed plaintiff on medical restrictions that removed plaintiff from jobs believed to have caused her injuries. Moreover, plaintiff's symptomatology was not conclusively linked to her employment; even plaintiff's private physician, Dr. Enam, could not attribute plaintiff's condition to her employment after examining her in May 2000.

Plaintiff also relies on evidence that defendant failed to implement a recommendation by an ergonomics committee to retrofit the OP 40 based upon a design by Steel Master Transfer, Inc., in order to prevent employee injuries. As the circuit court observed, however, the evidence indicated that Steel Master only provided an estimate of how much it would cost to reconfigure the OP 40 to certain specifications. The quote did not make any representations regarding the potential ergonomic benefits of such a reconfiguration. Further, the evidence shows that the proposed reconfiguration was not implemented at least in part because employee operators themselves decided that it was not feasible. In any case, plaintiff does not allege that either Clifton or Dr. Brewer made the decision not to retrofit the OP 40. Thus, plaintiff's allegations concerning the Steel Master quote do not support her intentional tort claim.

Finally, the evidence did not show that the OP 40 is a "continuously dangerous operative condition." A "continuously dangerous operative condition" is one that the employer "knows will cause injury, yet refrains from informing the employee about . . . so that he is unable to take steps to keep from being injured." *Travis, supra* at 178. In this case, the evidence did not show defendant knew that the OP 40 was certain to cause injury, nor was there evidence that defendant concealed information about the machine from plaintiff.

We conclude that plaintiff failed to show a genuine issue of material fact regarding whether defendant had actual knowledge that an injury to plaintiff was certain to occur and that it willfully disregarded that knowledge. The circuit court properly granted defendant's motion for summary disposition on the basis of the exclusive remedy provision of the WDCA.

In light of our disposition, we need not address defendant's alternative statute of limitations argument.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper